

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
AR DEC 12 2003
Michael N. Milby, Clerk

| | |
|---|-----------------------------|
| ----- | X |
| IN RE ENRON CORPORATION | : |
| SECURITIES LITIGATION | : |
| ----- | : |
| This Document Relates To: | : |
| | : |
| MARK NEWBY, et al., Individually and | : Consolidated Civil Action |
| On Behalf of All Others Similarly Situated, | : Case No.: H-01-CV-3624 |
| | : |
| Plaintiffs, | : |
| | : |
| v. | : |
| ENRON CORP., et al., | : |
| | : |
| Defendants. | : |
| ----- | X |

**BANK DEFENDANTS' REPLY TO ENRON'S MOTION FOR LIMITED
MODIFICATION OF THE COURT'S DEPOSITORY ORDER AND OF
THE COURT'S AUGUST 2002 DISCOVERY ORDER**

The undersigned Defendants¹ (collectively, the "Bank Defendants") respectfully submit this Reply to the December 5, 2003 Motion of Enron Corp. ("Enron") For Limited Modification Of The Court's Depository Order And Of The Court's August 2002 Discovery Order ("December 5 Motion").

¹ This submission is made on behalf of J.P. Morgan Chase & Co., J.P. Morgan Securities Inc, JPMorgan Chase Bank, Citigroup Inc., Citibank N.A., Citigroup Global Markets Inc. (formerly known as Salomon Smith Barney Inc.), Salomon Brothers Limited, Credit Suisse First Boston LLC (formerly known as Credit Suisse First Boston Corporation), Credit Suisse First Boston (USA), Inc., Pershing LLC, Canadian Imperial Bank of Commerce, CIBC World Markets Corp. (formerly known as CIBC Oppenheimer Corp.), CIBC World Markets plc, Bank of America Corporation, Banc of America Securities LLC, Merrill Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Lehman Brothers Inc., and Lehman Brothers Holdings Inc.

1893

Preliminary Statement

In its December 5 Motion, Enron confirms virtually all of the information reported to the Court in the Bank Defendants' December 5 submission² and vividly illustrates why the requested adjustment of the discovery schedule is so necessary. Enron acknowledges that it has not yet produced to the *Newby* Depository some 77 million pages of documents that are subject to the August 2002 Discovery Order. However, Enron makes no attempt to identify which of those documents it claims are irrelevant to this litigation and need not be produced. The Bank Defendants have repeatedly asked Enron to provide information about the source and subject matter of the withheld documents, to enable the Bank Defendants to determine which of the government productions should be produced to the *Newby* Depository as a matter of priority, and which productions can be deferred or potentially excused entirely. The only documents Enron argues are irrelevant to the *Newby* litigation are the Trading Databases produced to the Federal Energy Regulatory Commission ("FERC"), which the Bank Defendants have already told Enron are not a production priority, and can be deferred, subject to the consent of the other parties and the Court. Indeed, other than the FERC Trading Databases, Enron no longer asks the Court to relieve it of its obligation to produce documents subject to the August 2002 Order. Enron should be ordered – again – to produce these documents as soon as possible.

Enron's sole stated concern in its latest submission is cost; it does not wish to incur its 50% share of the costs associated with having 77 million pages of Enron documents processed by the *Newby* Depository administrator, Lex Solutio. In this regard, Enron tries

² Bank Defendants' December 5, 2003 Supplemental Memorandum In Opposition To The Motion Of Enron Corp. For Relief From August 2002 Discovery Order, And In Support Of The Bank Defendants' Cross-Motion For An Adjustment To The Scheduling Order (hereinafter "Bank Defendants' December 5 submission").

unconvincingly to paint itself as a disinterested non-party, instead of the central figure in these litigations that, but for the bankruptcy stay, would be a defendant. Moreover, Enron's submission also ignores the important fact that it is itself a plaintiff in related adversary proceedings pending before Judge Gonzalez, which will involve many of the documents subject to the August 2002 Order and which Enron will undoubtedly have to produce for purposes of that proceeding.

As explained in the Bank Defendants' December 5 submission, the Bank Defendants have no interest in receiving vast quantities of irrelevant documents, and do not seek to create unnecessary costs. Yet Enron has completely and utterly failed to provide the Bank Defendants with sufficient information on which to make reasoned determinations as to the relevance of each government production. Enron now improperly seeks to rely on the disorganization and volume of its government productions as an excuse to absolve itself from any further costs in turning over documents to the *Newby* Depository. For the reasons set forth below, the Bank Defendants respectfully submit that the cost-sharing arrangement reflected in the Depository Order should be left undisturbed, Enron should be ordered to comply with the August 2002 Order without modification (as it is already obligated to do) and simultaneously to provide additional information concerning the source and subject matter of the documents in its various government productions, to enable the Bank Defendants to identify any additional productions that can be deferred or avoided.

Enron's Request For A Modification To The Depository Order Should Be Denied

As Enron correctly notes in its December 5 Motion, "under the terms of the Depository Order Enron is responsible for half the cost associated with [producing its documents to the *Newby* Depository]." December 5 Motion, at 2. Enron now asks the Court to modify

Your Honor's October 31, 2002 Depository Order in such a way that Enron would be required to pay none of the costs associated with producing its documents to the Depository, rather than paying its 50% share of those costs as currently required by the Depository Order. Enron claims it should no longer have to pay any portion of the cost of producing its own documents because Enron is not a party to *Newby* or the related cases, and because this would allegedly "render a much more efficient, fair and equitable discovery process." December 5 Motion, at 12.

While it is true that the bankruptcy automatic stay precludes service of process on Enron, and it is therefore not a party to *Newby*, Enron goes much too far in suggesting that it should be treated like just another third party to this litigation. That assertion cannot withstand even modest scrutiny. Enron's conduct and its documents lie at the heart of this litigation. But for the automatic stay, Enron would be a party. Accordingly, it is entirely proper that the Depository Order, to which Enron was a signatory, imposes on Enron responsibility for paying 50% of the cost of producing its own documents, while imposing the remaining 50% on the Requesting Party. In that regard, it bears noting that Enron signed its consent to the proposed Depository Order on September 26, 2002, more than one month *after* entry of this Court's August 2002 Discovery Order requiring Enron to produce to the Depository its government productions, by which time Enron's potential obligations under the August 2002 Order were readily apparent. Moreover, Enron is not some passive non-party sitting on the sidelines; it is itself a plaintiff in a series of adversary proceedings pending before Judge Gonzalez, in which Enron seeks billions of dollars from certain Bank Defendants and other named defendants.

Enron seemingly ignores the fact that it voluntarily signed its consent to the Depository Order, and the fact that it is a party to litigations involving the same documents that are at issue here, by now arguing that Federal Rule of Civil Procedure 45 justifies modifying the

terms of the Depository Order to treat Enron as a disinterested non-party and absolve it from paying 50% of the cost of its further document productions. December 5 Motion, at 11-12. Even if it were appropriate to ignore Enron's prior consent to the Depository Order and now apply Rule 45, the cases interpreting Rule 45 do not assist Enron. Those cases uniformly conclude that "protection from significant expense does not mean that the requesting party necessarily must bear the entire cost of compliance", *In re The Exxon Valdez*, 142 F.R.D. 380, 383 (D.D.C. 1992), and that "a non-party can be required to bear some or all of its expenses where the equities of a particular case demand it." *Id.*; *In re Propulsid Prods. Liab. Litig.*, No.1 MDL 1355, 2003 WL 22174137, at *2 (E.D.La. Sept. 9, 2003). In cases where the non-party is "not the quintessential innocent, disinterested bystander", courts typically require the non-party to bear some or all of the costs of production themselves. *In re Honeywell Int'l*, No. M8-85 WHP, 2003 WL 22722961, at *9 (S.D.N.Y. Nov. 18, 2003); *In re First Am. Corp.*, 184 F.R.D. 234, 241-42 (S.D.N.Y. 1998). Similarly, if the non-party is involved in other litigation arising out of the same facts, courts view such parties as "not neutral" and have required them to pay at least some of the costs of document production. *In re First Am. Corp.*, 184 F.R.D. at 242.

Here, Enron is the absolute opposite of an innocent bystander, and it has commenced adversary proceedings in Bankruptcy Court arising out of the same facts that will no doubt involve many of the same documents. Moreover, Enron's failure to provide sufficient information to allow the Bank Defendants to narrow the scope of further Enron document productions is a factor that should be weighed in any consideration of Rule 45. Accordingly, Rule 45 neither mandates nor supports the modification to the Depository Order that Enron seeks.

Enron disingenuously argues that the cost-sharing arrangements in the Depository Order provide insufficient incentives for the Requesting Party to seek narrowly tailored discovery. Based on that false premise, Enron further claims that the terms of the Depository Order somehow “created” the present situation, “where tens, if not hundreds, of millions of documents are scheduled to be produced, without regard to their relevance or usefulness.” December 5 Motion, at 12-13. This argument is plain wrong on numerous counts. *First*, the Requesting Party has adequate incentives to seek only the discovery it needs; the Depository Order requires the Requesting Party to pay 50% of the Lex Solutio processing costs. Furthermore, the Requesting Party has to bear its own internal costs of reviewing and organizing the documents. Accordingly, it is untenable for Enron to suggest that the Requesting Party has no incentive to reasonably limit its discovery requests.

Second, the Bank Defendants have not issued overbroad discovery requests to Enron. The Lead Plaintiff requested that Enron produce to the *Newby* Depository its productions to various government entities, and Your Honor granted that request in the August 2002 Order, recognizing that Enron’s government productions, while voluminous, would likely contain many of the most important materials for this case.³

Finally, the Bank Defendants have not sought production of documents “without regard to their relevance or usefulness” as Enron asserts. December 5 Motion, at 13. The exact opposite is true. The Bank Defendants have told Enron that they do not want to be swamped

³ In its December 5 Motion, Enron attempts to make something out of the fact that the Bank Defendants objected to the Lead Plaintiff’s May 28, 2002 motion that resulted in the August 2002 Order. December 5 Motion, at 5. However, the basis of the Bank Defendants’ objection was that the Lead Plaintiff’s request, which pre-dated Your Honor’s ruling on the Bank Defendants’ motions to dismiss, directly conflicted with the stay of discovery imposed by the Private Securities Litigation Reform Act.

with vast quantities of irrelevant documents; they only seek to get the most important documents, and to get them quickly. To that end, the Bank Defendants have asked Enron to provide sufficient information about its various outstanding government productions to enable the Bank Defendants to make reasonable and informed determinations as to which productions can be deferred or excused entirely from the August 2002 Order, subject, of course, to the consent of other parties and the Court. Despite numerous discussions between counsel and requests by the Bank Defendants for information that would allow identification of the most important documents, or at least the productions in which those documents are most likely to be found, Enron has to date provided only a limited index that does not even come close to providing the descriptive information necessary to make those determinations. Given the paucity of such information, the Bank Defendants have asked Enron to prioritize delivery to the Depository of productions that seem most likely to contain relevant documents, namely Enron's productions to the Securities and Exchange Commission, the Department of Justice, the Federal Bureau of Investigation and the Senate Committee on Governmental Affairs/Permanent Subcommittee on Investigations. Against that background, it is far more accurate to say that if any Enron documents are produced "without regard to their relevance or usefulness", Enron bears sole responsibility for that sorry state of affairs, and Enron is unnecessarily burdening the Bank Defendants with the task of ferreting out the relevant documents.

Accordingly, Enron completely misses the mark when it suggests that the cost-sharing arrangements in the Depository Order are responsible for the current situation. In fact, it is not only appropriate, but also entirely necessary that Enron continue to have a financial incentive – its 50% share of Lex Solutio processing costs – to provide the Bank Defendants with information that would potentially reduce the volume of documents that need be produced to the

Depository. Enron should not be allowed to rely on its own inability or unwillingness to provide basic descriptive information about the contents of its various government productions to excuse it from further costs in producing those documents.

As noted above, Enron's argument about the alleged "undue burden" of producing its documents is also belied by the fact that Enron has commenced in Bankruptcy Court adversary proceedings against certain Bank Defendants and other parties raising many of the same issues as arise in the present litigation. Accordingly, Enron will in due course have to produce most or all of the very same documents it has so far withheld, or at the very least will have to review the documents contained in its prior government productions and determine their relevance to the issues in that case. Furthermore, Enron's continued payment of 50% of the costs of producing its documents does not seem at all unreasonable when compared to the magnitude of this case and its impact on the parties.⁴

The Bank Defendants Do Not Oppose Enron Deferring Production Of Trading Databases

Enron's repeated references to the Trading Databases produced to FERC are a distraction that need not occupy this Court's time now. The Bank Defendants have told Enron that production of these databases is not a priority, and the Bank Defendants once again confirm that they do not oppose Enron deferring their production. While it is not possible at this early point in the litigation to entirely discount the possibility that these databases might later prove relevant, any discussion about allocating the cost of producing the databases can be had if and when their production becomes necessary. Accordingly, if the Court and other parties are amenable to this approach, the Bank Defendants propose that Enron be excused from producing

⁴ The costs of producing Enron's documents are also dwarfed by the professional fees incurred to date in Enron's bankruptcy, as referenced in the Bank Defendants' December 5 submission, at 13 n.7.

the Trading Databases at this point in time, subject to any party's right to request that they be produced at some future time.

Conclusion

For the reasons set forth above, the Bank Defendants respectfully submit that Enron's December 5 Motion to modify the Court's Depository Order should be denied, and its motion to modify the Court's August 2002 Discovery Order should be denied except as regards the Trading Databases produced to FERC. Furthermore, Enron should be ordered to comply with the August 2002 Order without modification (as it is already obligated to do) and to simultaneously provide additional information concerning the source and subject matter of the documents in its various government productions, sufficient to enable the Bank Defendants to identify any additional productions that can be deferred or excused from the August 2002 Order subject to the Court's approval.

Dated: December 12, 2003

Respectfully submitted,

/s/ Richard W. Mithoff
Richard Warren Mithoff
Attorney-in-Charge
Texas Bar No. 14228500
S.D. Texas I.D. No. 2102
MITHOFF & JACKS, L.L.P.
One Allen Center, Penthouse
500 Dallas Street, Suite 3450
Houston, Texas 77002
Telephone: (713) 654-1122
Telecopier: (713) 739-8085

OF COUNSEL:

Charles A. Gall
Texas Bar No. 07281500
S.D. Texas Bar No. 11017
James W. Bowen
Texas Bar No. 02723305
S.D. Texas I.D. No. 16337
JENKENS & GILCHRIST, P.C.
A PROFESSIONAL CORPORATION
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202
Telephone: (214) 855-4500
Telecopier: (214) 855-4300

Bruce D. Angiolillo
Thomas C. Rice
David J. Woll
Jonathan K. Youngwood
SIMPSON THACHER & BARTLETT
425 Lexington Avenue
New York, New York 10017
Telephone: (212) 455-2000
Telecopier: (212) 455-2502

***Attorneys for J.P. Morgan Chase & Co., J.P.
Morgan Securities Inc. and JPMorgan Chase
Bank***

/s/ Jacalyn D. Scott

Jacalyn D. Scott
Attorney-in-Charge
Texas Bar No. 17899900
Eugene B. Wilshire
WILSHIRE, SCOTT & DYER
3000 Houston Center, 1221 McKinney
Houston, Texas 77010
Telephone: (713) 651-1221
Telecopier: (713) 651-0020

Brad S. Karp
Mark F. Pomerantz
Richard A. Rosen
Michael E. Gertzman
Claudia L. Hammerman
Jonathan H. Hurwitz
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
Telephone: (212) 373-3000
Telecopier: (212) 757-3990

***Attorneys for Citigroup, Inc., Citibank
N.A., Salomon Smith Barney Inc., and Salomon
Brothers International Inc.***

/s/ Hugh R. Whiting

Hugh R. Whiting
Attorney-in-Charge
Texas Bar No. 21373500
S.D. Texas I.D. No. 30188
JONES DAY
717 Texas Ave, Suite 3300
Houston, Texas 77002
Telephone: (832) 239-3939
Telecopier: (832) 239-3600

David L. Carden
Robert C. Micheletto (not admitted in NY)
JONES DAY
222 East 41st Street
New York, New York 10017-6702
Telephone: (212) 326-3939
Telecopier: (212) 755-7306

***Attorneys for Lehman Brothers Holdings Inc.
and Lehman Brothers Inc.***

/s/ Gregory A. Markel
Gregory A. Markel, (admitted pro hac vice)
Attorney-in-Charge
Ronit Setton, (admitted pro hac vice)
Nancy I. Ruskin (admitted pro hac vice)
CADWALADER, WICKERSHAM & TAFT LLP
100 Maiden Lane
New York, New York 10038
Telephone: (212) 504-6000
Telecopier: (212) 504-6666

OF COUNSEL:

Charles G. King
Texas Bar No. 11470000
S.D. Texas I.D. No. 01344
KING & PENNINGTON LLP
1100 Louisiana Street, Suite 5055
Houston, Texas 77002-5220
Telephone: (713) 225-8404
Telecopier: (713) 225-8488

*Attorneys for Bank of America Corporation and
Banc of America Securities LLC*

/s/ Barry Abrams

Barry Abrams
Attorney-in-Charge
Texas Bar No. 00822700
S.D. Texas I.D. No. 2138
ABRAMS SCOTT & BICKLEY, LLP
700 Louisiana, Suite 1800
Houston, Texas 77002
Telephone: (713) 228-6601
Telecopier: (713) 228-6605

OF COUNSEL:

David H. Braff
Michael T. Tomaino, Jr.
Jeffrey T. Scott
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
Telephone: (212) 558-4000
Telecopier: (212) 558-3588

*Attorneys for Barclays PLC, Barclays Bank PLC
and Barclays Capital, Inc.*

/s/ Mark D. Manela

Mark D. Manela
Texas Bar No. 12894500
S.D. Texas Bar No. 1821
MAYER, BROWN, ROWE & MAW
700 Louisiana Street, Suite 3600
Houston, Texas 77002-2730
Telephone: (713) 221-1651
Telecopier: (713) 224-6410

Alan N. Salpeter
Michele Odorizzi
T. Mark McLaughlin
MAYER, BROWN, ROWE & MAW
190 South LaSalle Street
Chicago, Illinois 60603
Telephone: (312) 782-0600
Telecopier: (312) 701-7711

B.J. Rothbaum
Drew Neville
Charles E. Gerber
HARTZOG CONGER CASON & NEVILLE
201 Robert S. Kerr Avenue, Suite 1600
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-7000
Telecopier: (405) 235-7329

*Attorneys for CIBC World Markets Corp.
(formerly known as CIBC Oppenheimer Corp.),
Canadian Imperial Bank of Commerce and
CIBC World Markets plc*

/s/ Lawrence D. Finder

Lawrence D. Finder
Attorney-in-Charge
Texas Bar No. 07007200
S.D. Texas I.D. No. 602
Odean L. Volker
Texas Bar No. 20607715
S.D. Texas I.D. No. 12685
HAYNES and BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, Texas 77002-5012
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

OF COUNSEL:

Richard W. Clary
Julie A. North
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 0019-7475
Telephone: (212) 474-1000
Telecopier: (212) 474-3700

***Attorneys for Credit Suisse First Boston LLC
(formerly known as Credit Suisse First Boston
Corporation), Credit Suisse First Boston (USA)
Inc., and Pershing LLC***

/s/ Taylor M. Hicks

Taylor M. Hicks
Texas Bar No. 09585000
Southern District I.D. No. 3079
Stephen M. Loftin
Texas Bar No. 12489510
Southern District I.D. No. 12676
HICKS THOMAS & LILIENSTERN, LLP
700 Louisiana, Suite 1700
Houston, Texas 77002
Telephone: (713) 547-9100
Telecopier: (713) 547-9150

OF COUNSEL:

Herbert S. Washer
James D. Miller
Ignatius A. Grande
CLIFFORD CHANCE US LLP
200 Park Avenue, Suite 5200
New York, New York 10166-0153
Telephone: (212) 878-8000
Telecopier: (212) 878-8375

Robert Serio
Marshall R. King
GIBSON, DUNN & CRUTCHER, L.L.P.
200 Park Avenue
New York, New York 10166-0193
Telephone: (212) 351-4000
Telecopier: (212) 351-4035

***Attorneys for Merrill Lynch & Co., Inc. and
Merrill Lynch, Pierce, Fenner & Smith
Incorporated***

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served upon all counsel of record via the www.esl3624.com website, on this 12th day of December 2003.

/s/ Alan C. Turner
Alan C. Turner